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No. 09-5

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRET FREEMAN,
Petitioner,

v.

NORFOLK SOUTHERN CORPORATION;
NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit correctly applied the federal class certification standards when it determined that the district court, after rigorous analysis, correctly exercised its discretion in holding that Petitioner failed to demonstrate impracticability of joinder under Rule 23(a)?

PARTIES TO THE PROCEEDING

Respondent Norfolk Southern Railway Company is a wholly-owned subsidiary of Norfolk Southern Corporation. Norfolk Southern Corporation is a publicly traded corporation. No parent or publicly held corporation owns 10% or more of the stock of Norfolk Southern Corporation.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

Norfolk Southern Railway Company and Norfolk Southern Corporation ("Respondents") hereby oppose the petition for a writ of certiorari seeking review of an unpublished order of the United States Court of Appeals for the Sixth Circuit. The court of appeals affirmed the Order of the United States District Court for the Eastern District of Tennessee in favor of Respondents on a discretionary ruling with respect to class certification. This case does not warrant certiorari because it involves nothing more than the appropriate exercise of discretion in applying well-established standards under Fed. R. Civ. P. 23 to the specific allegations of the Petitioner in this case.

COUNTERSTATEMENT OF THE CASE

Petitioner omitted certain facts and procedural history germane to the underlying class certification inquiry and relied on by the district court and Sixth Circuit, and Petitioner mischaracterized the reasoning of the Sixth Circuit. Those omissions and mischaracterizations justify a brief counter-statement. Sup. Ct. R. 15(2).

A. Factual Background

This is an action for nuisance arising from a train derailment that occurred on September 15, 2002, in Knox County, Tennessee. Pet. App. 2a. Following the derailment, one of the derailed cars began leaking dilute sulphuric acid. As a precaution, a mandatory evacuation of residents living within a 1.3-mile radius of the derailment site and a voluntary evacuation of residents living within a 3-mile radius of the derailment site were ordered. Pet. App. 2a. Petitioner and his family lived approximately 1.1 miles from the derailment site. Pet. App. 3a.

Following the incident Respondents set up a claims center to reimburse those residents impacted by the derailment for out-of-pocket expenses. Pet. App. 2a. There were 963 households located in the 1.3-mile radius, of which 827 households received compensation, and an additional 6,047 households in the 3-mile radius, of which 1,037 households received compensation. Pet. App. 2a. Speculating that three people to a household was a "fair number," Petitioner alleged that there were 15,000 potential plaintiffs within the 3-mile radius. Pet. App. 7a. Petitioner never provided the district court with any factual basis for determining the actual number of *people* in

either of those zones.[1] Indeed, Petitioner admitted in a letter to the district court that the estimate was based on personal belief, stating "they *believe* that 3 people to a household is a fair number." Pet. App. 21a. No basis for this "belief" was ever presented to the court; it was a number drawn from thin air.

B. Procedural History

The class definition in this case has been described by the Sixth Circuit as a "moving target," with seven different iterations presented by Petitioner over the course of the proceedings. Pet. App. 4a.

The district court denied Petitioner's efforts to certify a class on three separate occasions. The first motion for class certification, filed on August 21, 2003, was denied by the district court as premature. Pet. App. 3a. A renewed motion for class certification, with a new class definition, was filed on March 30, 2005. Pet. App. 3a. Following a full evidentiary hearing on the Rule 23 requirements, and taking into account Petitioner's post-submission modifications to that definition, the district court considered and rejected the class defined as:

> All persons (1) who evacuated their real property and/or "sheltered in place,"[2] and/or were pre-

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[1] Consequently, Petitioner failed to identify the number of *people* who fit within the definition of the proposed class.

[2] Petitioner refers to the phrase "shelter in place" in the fact section of his Petition and erroneously attributes the definition of that phrase to the magistrate judge. Pet. 8 n. 1. In fact, examination of the pleading referenced by Petitioner shows that definition was supplied by Petitioner, "Although the phrase is not particularly defined in the Third Amended Complaint, the plaintiffs' letter of June 15, 2005 [Doc. 95] states that 'shelter in place' means 'that if people chose not to leave their homes, then

> vented from returning to their homes and (2) who suffered all available nuisance damages, including economic losses and inconvenience, as a result of, and within a three mile radius from, the derailment and toxic spill.

Pet. App. 4a.

In its opinion, the district court acknowledged its obligation to conduct a "rigorous analysis" of the Rule 23 elements as prescribed by this Court in *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2864, 2372, 72 L.Ed.2d 740 (1982). Pet. App. 25a. As part of that "rigorous analysis," several points were highlighted by the district court. First, Petitioner relied solely on information provided by Respondents as to the number of *households* in the area though the class was purportedly defined in terms of *persons*. Pet. App. 25a, 27a. Second, the district court expressed deep skepticism as to Petitioner's "fair number" estimate of the number of *persons* to a household. Pet. App. 25a. Third, Petitioner's claims were not as expansive as the proposed definition. Pet. App. 28a. Finally, the district court highlighted the limited geographic area of the proposed class, a 3-mile radius. Pet. App. 27a. The district court concluded that Petitioner failed to demonstrate impracticability of joinder, typicality, and adequate representation. Pet. App. 27a, 28a, 29a.

Petitioner renewed the motion to certify a class on February 14, 2007. The class Petitioner sought to certify at that point was "all persons who were evacuated from the surrounding area." Pet. App. 5a.

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they were to stay there and not come and go, while also turning off their air conditioning and closing all doors and windows.'" Pet. App. 30a.

The district court held a hearing and denied the motion, referring to the reasoning in the magistrate's report and recommendation. Pet. App. 5a.

In an unpublished opinion, the Sixth Circuit unanimously affirmed the findings of the district court. Focusing on the numerosity element of Rule 23, the court noted that impracticability of joinder requires some positive showing and cannot be purely speculative. Pet. App. 7a. Though ignored by Petitioner, a significant factor identified by the Sixth Circuit as supporting the district court's finding was that joinder was practicable due to the tight geographical proximity of putative plaintiffs to each other and the discrete and obvious nature of the harm. Pet. App. 6a. The Sixth Circuit classified the "speculative nature of Freeman's estimates" as a secondary factor supporting the district court's finding. Pet. App. 6a ("the speculative nature of Freeman's estimates *further demonstrates* that the district court did not abuse its discretion when it found that the class was not sufficiently numerous to merit certification."). As to the speculative nature of Petitioner's putative class size submission, albeit unnecessary to support the conclusion that Petitioner failed to demonstrate impracticability of joinder, the Sixth Circuit noted that Petitioner "cites large numbers, but his numbers include not just the members of his proposed class but every resident of the three-mile radius. Without 'some evidence of the size either of the excluded group or of the remaining class,' Freeman's evidence of numerosity remains speculative." Pet. App. 9a (internal citations omitted).

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with any decision of this Court or that of any court of appeals and, as such, do not warrant further review. To the extent clarification may eventually be needed from this Court on class certification standards, this unpublished, factually dependent decision, involving a case characterized by its ever-morphing class definitions, is an unsuitable vehicle for establishing such a standard. Essentially, this case involves no more than an appropriate exercise of judicial discretion to deny a class where, after ample opportunity, the Petitioner has not and cannot adequately define the representative class, much less establish the prerequisites of Federal Rule of Civil Procedure 23.

1. Petitioner asks this Court to grant review because he contends that the decisions of the courts below conflict with *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

In *Eisen*, this Court held that the district court erred in its "resolution of the notice problems" of the class action by failing to comply with Rule 23(c)(2) in imposing the costs of notice on the defendants. *Eisen*, 417 U.S. 156 at 172-73. In passing the Court stated,

> We find nothing in either the language or history of Rule 23 that gives *a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action*. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action *without first satisfying the requirements for it*.

Eisen, 417 U.S. 156 at 177 (emphasis added). Taken out of context, Petitioner misconstrues this statement to mean that no merits inquiry should ever be conducted as part of a Rule 23 analysis and thus that the plaintiff essentially has no burden to show that the requirements of Rule 23 have been satisfied. However, the "inquiry into the merits" statements in *Eisen* do not support Petitioner's position. First, and importantly, the *Eisen* class had already been certified under prongs (a) and (b) of Rule 23, thus the merits inquiry was not held in connection with "satisfying the requirements" of Rule 23(a), but rather in connection with the allocation of the costs of notice to potential class members. The Court's statement merely reflected that the merits inquiry into the plaintiff's potential likelihood of success was inappropriate at this stage of the proceedings. Second, this Court, rejecting the class's attempts to impose notice costs on the defendants, emphasized that a potential class plaintiff cannot "secure the benefits of a class without first satisfying the requirements for it." *Id.*

Petitioner acknowledges, but ultimately refuses to apply, this Court's post-*Eisen* decisions directed to the analysis of the actual requirements of Rule 23. Pet. 19, 27. In *Coopers & Lybrand*, this Court recognized that evidence pertaining to Rule 23's requirements is often "enmeshed in the factual and legal issues comprising the plaintiffs' cause of action," and that the "[e]valuation of many of the questions entering into determination of class action questions is *intimately involved with the merits* of the claims. . . ." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12, 98 S.Ct. 2454, 2458 n.12, 57 L.Ed.2d 351 (1978)(emphasis added). Recognizing that "actual, not presumed, conformance with Rule 23(a) remains ... indispensable," this Court instructed that a class "may *only* be

certified if the trial court is satisfied, after *a rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied" and that it may often be necessary to "probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (emphasis added).

These decisions, when considered together, stand for the proposition that factual and legal issues may relate to both the merits of the underlying case and to the Rule 23 requirements. As noted by the Fifth Circuit, *Eisen* stands "for the unremarkable proposition that the strength of a plaintiff's claim should not affect the certification decision" and does not suggest "that a court is limited to the pleadings when deciding on certification." *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). Indeed, the Tenth Circuit has observed that the phrase "no merits inquiry" should not be "talismanically invoked to artificially limit a district court's reasoned determination of whether Rule 23's requirements have been met." *Vallario v. Vandehey,* 554 F.3d 1259, 1267 (10th Cir. 2009). Only by taking the statement in *Eisen* out of context and ignoring this Court's more direct holdings can Petitioner claim any error. Clearly, that is no basis for granting certiorari.

With the above principles in mind, the decision of the Sixth Circuit affirming the district court, did not violate, deviate, or depart from any holding of this Court. The Sixth Circuit correctly held that the District Court did not abuse its discretion when it acknowledged this Court's mandate and properly conducted a "rigorous analysis" for the purpose of evaluating whether Petitioner met the requirements of Rule 23(a). Pet. App. 25a; *Falcon*, 457 U.S. 147 at 160-161. The Sixth Circuit's use of the word "con-

crete" cannot bear the weight Petitioner attaches to it because the term does no more than stand for the unremarkable proposition that the proof required could not be merely "speculative." *See Falcon*, 457 U.S. 147 at 158 (cautioning against drawing inferences); 7A Charles Alan Wright, Arthur R. Miller and Mary K. Kane, *Federal Practice and Procedure* §1762 (3d ed. 2005).

2. Petitioner points to an illusory conflict between circuits interpreting *Eisen* and the standard of proof for class certification motions.[3] Pet. 21-27. As noted by this Court in *Falcon*, class actions may only be certified if, after rigorous analysis, the trial court is *satisfied* that the prerequisites of Rule 23 have been met. In trying to manufacture a conflict, Petitioner ignores the broad discretion granted to district courts within the Rule 23 framework. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) (district courts have "broad power and discretion ... with respect to matters involving the certification" of class actions); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 559 (6th Cir. 2007) (district court "maintains substantial discretion" and possesses "the inherent power to manage and control its own pending litigation"), *cert. denied*, 129 S.Ct. 608 (2008).

Petitioner suggests that lower courts, mainly at the district court level, have difficulty reconciling this Court's decisions in *Eisen* and *Falcon*. Pet. 20-21. Citing district court cases such as *Harman v. LyphoMed, Inc.*, 122 F.R.D. 522 (N.D. Ill. 1988), and *In re IGI Securities Litigation*, 122 F.R.D. 451

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[3] Notably, Petitioner does not separately argue that certiorari is warranted to resolve any conflict among the lower courts, which speaks volumes about the weakness of this argument.

(D. N.J. 1988), to support his argument, Petitioner ignores subsequent decisions by the appellate courts over those districts, which reflect no difficulty in applying this Court's decisions. *See Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 188 (3d Cir. 2001), *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-676 (7th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001). One decision cited by Petitioner does not relate to an analysis of Rule 23 requirements, while another acknowledges this Court's statement in *Falcon*. *See Armstrong v. Weichert Realtors*, 2006 WL 1455781 (D. N.J. 2006)(addressing class certification under Fair Labor Standards Act, 29 U.S.C. §216(b)); *Kane v. United Independent Union Welfare Fund*, 1998 WL 78985 (E.D. Pa. 1998)(acknowledging that certification is appropriate if the court is satisfied that Rule 23 requirements are met after "rigorous analysis"). The remaining cases cited by Petitioner on this point actually pre-date *Falcon*. *See Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *Gilchrist v. Bolger*, 89 F.R.D. 402 (S.D. Ga. 1981), *aff'd*, 733 F.2d 1551 (11th Cir. 1984); *Brinkerhoff v. Rockwell Intern. Corp.*, 83 F.R.D. 478, 481 (N.D. Tex. 1979); *Briggs v. Brown & Williamson Tobacco Corp., Inc.*, 414 F.Supp. 371 (E.D. Va. 1976).

Even more non-existent is any inter-circuit conflict. The circuit courts have all acknowledged *Eisen* and the legal standard set out by this Court in *Falcon*. Petitioner correctly notes that the Second, Fourth, Fifth and Seventh Circuits recognize the "rigorous analysis" required by this Court which may overlap with the merits inquiry. *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24, 40-41 (2d Cir. 2006), *reh'g denied*, 483 F.3d 70 (2d Cir. 2007); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365-366 (4th Cir.

2004); *Unger v. Amedisys Inc.*, 401 F.3d 316, 320-21 (5th Cir. 2005); and *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-77 (7th Cir. 2001). Although Petitioner suggests that other circuits employ differing standards, that is wishful thinking on his part. The First, Third, Eighth, Tenth and Eleventh Circuits have all recognized the rigorous analysis required by this Court and the need for analysis relating to the Rule 23 requirements even where those findings overlap the merits inquiry. *See, e.g., Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 297-98 (1st Cir. 2000); *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 309 (3d Cir. 2008); *Elizabeth M. v. Montenez*, 458 F.3d 779, 786 (8th Cir. 2006); *Shook v. El Paso County*, 386 F.3d 963, 968 (10th Cir. 2004), *cert. denied*, 544 U.S. 978 (2005), and *Vallario v. Vandehey*, 554 F.3d 1259, 1266-67 (10th Cir. 2009); and *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228, 1234 (11th Cir. 2000), *cert. denied*, 532 U.S. 919 (2001).

Petitioner cites to the Ninth Circuit's decision, *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1227 (9th Cir. 2007), *reh'g en banc granted*, 556 F.3d 919 (9th Cir. 2009), as being "at the other end of the spectrum" in holding that "arguments evaluating the weight of evidence or the merits ... are improper at the certification stage." Pet. 24. Petitioner's statement ignores at least two salient points. First, after a petition for rehearing was filed in the original opinion of *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), *withdrawn*, 509 F.3d 1168 (9th Cir. 2007), wherein the court shied away from resolving conflicting evidence of a class certification petition, the panel amended its opinion to note that "courts are not only at liberty to but must consider evidence which goes to the requirements of Rule 23 at the

class certification stage even if the evidence may also relate to the underlying merits of the case." *Dukes*, 509 F.3d 1168 at 1177 n.2 (9th Cir. 2007). Second, the Ninth Circuit has granted *en banc* rehearing in *Dukes* to address the very issue of merits inquiry. *Dukes*, 509 F.3d 1168 (9th Cir. 2007), *reh'g en banc granted*, 556 F.3d 919 (9th Cir. 2009). If the Ninth Circuit ultimately adopts a rule that deviates from the other Circuits, this Court no doubt will have the opportunity to review that decision. That potential conflict presents no reason to review the narrow holding in this case.

The Sixth Circuit is squarely in line with its sister circuits, recognizing this Court's instruction to conduct a "rigorous analysis" into Rule 23 requirements and acknowledging that the analysis may necessarily overlap with facts that would tend toward the merits inquiry. *See In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir 1996)(recognizing need to conduct a "rigorous analysis" and noting that a determination as to maintainability as a class action "should be predicated on more information than the pleadings will provide"). The decision in this case does not depart from that legal standard. Here, the Sixth Circuit found that Petitioner failed to "demonstrate affirmatively" the impracticability of joinder as a prerequisite to certification, basing its finding primarily on the tight geographic proximity of putative plaintiffs and the discrete and obvious nature of the harm and secondarily on the speculative nature of the class size. Pet. App. 5a, 6a. That inherently fact-based determination presents no issue warranting further review.

3. Petitioner argues that the Sixth Circuit deviates from accepted standards "for determining numerosity

and impracticability of joinder." Pet. 12. The Sixth Circuit began its analysis of the Rule 23(a) numerosity requirement by explaining a misconception to which Petitioner has apparently fallen victim. It noted that "[w]hile this requirement is commonly referred to as a 'numerosity' requirement, the real issue is whether the plaintiff seeking class certification has demonstrated impracticability of joinder." Pet. App. 6a. Though ignored by Petitioner, the main factor identified by the Sixth Circuit as supporting the district court's finding was that joinder was practicable due to the tight geographical proximity of putative plaintiffs to each other and the discrete and obvious nature of the harm. Pet. App. 6a. Consequently, these potential plaintiffs could be relatively easily identified and contacted, thus Petitioner did not show that joinder was impracticable. The focus of Petitioner's argument——the court's rejection of his assumption regarding class size—is irrelevant as there is an alternative basis for supporting the holding of the Sixth Circuit.

The inquiry into class size conducted by the Sixth Circuit did not impose a heightened burden on Petitioner or deviate from accepted standards. In line with this Court's decision in *Falcon,* which cautioned against accepting inferences, the Sixth Circuit required that "impracticability of joinder ... be positively shown, and cannot be speculative." Pet. App. 7a (citation omitted). To establish impracticability of joinder, the Petitioner alleged that 15,000 potential class members existed based on his unsupported and undocumented "belief" that three people to a household in the affected area was a fair number.[4] Pet. 9.

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[4] Petitioner acknowledges that a number of households were compensated by Respondents following the incident and would

Petitioner acknowledges that while speculation is insufficient to fulfill this requirement, "some evidence or *reasonable estimate* of the number of purported class members" must be shown. Pet. 13 (citing *Pederson v. La State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000)). Both lower courts recognized that Petitioner's "belief" was based on data from Respondents as to the number of *households* while the class definition was in terms of *persons*. Pet. App. 6a-7a; 23a, 25a. Both lower courts recognized that the class Petitioner sought to certify was actually a smaller subset of this unsubstantiated total. Pet. App. 7a-8a, 27a. That neither the Sixth Circuit nor the district court found, following their rigorous analysis of the Rule 23 elements, Petitioner's "belief" to be a "reasonable estimate" signals an appropriate exercise of discretion, not a departure from federal standards or the imposition of a heightened burden. In any event the issue clearly does not warrant certiorari.

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not be part of the class. Pet. 12. While Petitioner argues that it is reasonable to assume that these households all suffered damage, ignoring this Court's caution in *Falcon* against drawing such inferences, an equally valid inference would be that the households remaining uncompensated suffered no damages.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should not be granted.

Respectfully submitted,

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